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IN THE

Supreme Court of the United States

YVONNE G. TROUT, CLARA PERLINGIERO, ET AL.,
PETITIONERS

v.

SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. **THE APPLICABILITY OF *ALTMANN*** 1

II. **APPLICATION OF *HENSLEY V. ECKERHART*** 5

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 4
Alliance to End Repression v. City of Chicago, 356 F.3d 767 (7th Cir. 2004) 11
Ash v. Tyson Food, Inc., 546 U.S. 454 (2006) 11
AT&T Corp. v. Hulteen, 556 U.S. ___, 2009 WL 1361539 (May 18, 2009) 5
Austria v. Altmann, 541 U.S. 677 (2004) 1, 2, 3, 4
Chandler v. Roudebush, 425 U.S. 840 (1976) 4
Cody v. Hillard, 304 F.3d 767 (8th Cir. 2002) 8
Commissioner, INS v. Jean, 496 U.S. 154 (1990) 7
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 6
De Jesus Nazario v. Rodriguez, 554 F.3d 196 (1st Cir. 2009) 7
Farrar v. Hobby, 506 U.S. 103 (1992) 5
Gautreaux v. Chicago Housing Authority, 491 F.3d 649 (7th Cir. 2007) 11
Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*
Jaffe v. Redmond, 142 F.3d 409 (7th Cir. 1998) 11
Jenkins v. State of Missouri, 127 F.3d 709 (8th Cir. 1997) 6, 8
Johnson v. City of Tulsa, Oklahoma, 489 F.3d 1089 (10th Cir. 2007) 8
Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) 2
Kansas v. Colorado, 533 U.S. 1 (2001) 6
Landgraf v. USI Film Products, 511 U.S. 244 (1994) 1, 3
Montana v. Kennedy, 366 U.S. 308 (1961) 5
Plyler v. Evatt, 902 F.2d 273 (4th Cir.1990) 8
Tex. State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782 (1989) 6
Uniroyal Goodrich Tire Co. v. Mutual Trading Corp., 63 F.3d 516 (7th Cir. 1995) 11

STATUTES

28 U.S.C. §1602 4

I. THE APPLICABILITY OF *ALTMANN*

A.

Respondent misconstrues the key point in Petitioners' argument, that the Court's opinion in *Austria v. Altmann*, 541 U.S. 677 (2004) ("*Altmann*") is an application and refinement of the analysis in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) ("*Landgraf*"). Petitioners never claim that *Altmann* "marked such a departure in the Court's retroactivity analysis." *See* Opposition at 7. Since "there is no special reason to think that all the diverse provisions of the Act must be treated uniformly for such purposes," *Landgraf*, 511 U.S. at 280, there is no reason to believe that the "relevant retroactivity event" for Section 114(2) of the 1991 Act is the same as for other sections of the 1991 Act. The *Altmann* Court's adoption of Justice Scalia's analysis of how to determine whether a waiver of sovereign immunity is retroactive is fully consistent with *Landgraf*. The Court should look to *Altmann* to resolve whether Section 114(2) of the Act applies to this litigation and determine "the relevant retroactivity event," where the United States asserts sovereign immunity after passage of the Act.

In *Landgraf*, the Court observed that: "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Id.* at 269 (footnote and parallel citation omitted). Under *Altmann*, the "relevant retroactivity event" is the assertion of the defense of sovereign immunity to the payment of prejudgment interest. Under the rule of decision announced in *Altmann*, the application of the Civil Rights Act of 1991 to pre-statute actions does not violate the presumption against retroactive legislation

where the government first asserts a defense of sovereign immunity after the passage of the Act. 541 U.S. at 692-700. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 839 (1990) (judgment is the point at which "expectations with respect to interest liability were fixed"). Since the "relevant retroactivity event" regulated by Section 114(2) of the Act is the assertion of sovereign immunity, the application of Section 114(2) of the Act waiving sovereign immunity of the United States to the November, 1993 judgment is not impermissibly retroactive.

Respondent claims that Justice Scalia's "focus on 'relevant activity that the rule regulates' would support the court of appeals' conclusion here because the 'relevant retroactivity event' for Section 114(2) is the conduct underling the putative Title VII violation." Opposition at 10, n 1 (citations omitted). In making this argument, Respondent cites the 2003 opinion by the D.C. Circuit, but offers no explanation as to why "the conduct underling the putative Title VII violation" should be considered the "relevant retroactivity event," rather than the date on which a party asserts a defense of sovereign immunity. This is certainly contrary to the view of the *Altmann* Court. *Altmann*, 541 U.S. at 696, n. 17 (the "relevant retroactivity event" for determining whether the application of a waiver of sovereign immunity is retroactive or retrospective is not determined by the dates of the conduct at issue.) Respondent offers no principled basis for arguing that the "relevant retroactivity event" should be different where the United States, rather than a foreign government, asserts the defense of sovereign immunity, where both statutes "take effect upon

enactment."[1] *See* Section 402(a) of the Civil Rights Act of 1991. *See Landgraf*, 511 U.S. at 293 (for jurisdiction cases the "relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.") (Scalia, J. concurring).

B.

Petitioners do not argue that the other courts of appeal addressing the applicability of Section 114(2) "are now entirely mistaken in their uniform view about Section 114(2)'s retroactivity." *See* Opposition at 8. Rather, Petitioners assert that these decisions decided prior to *Altmann* do not address the precise issue raised here, that the application of Section 114(2) to this litigation is not a retroactive application of the statute under *Altmann*.

C.

During the intervening period of more than fifteen years since *Landgraf*, the Court has addressed on numerous occasions the impact of a change in the law on actions that occurred prior to the passage of the new law and, in particular, whether the application of a new law is retroactive and whether the statutory change applies to cases already pending in the court. *See* Petition at 12.

This Petition raises important questions as to whether a change in statutory law applies to a specific

[1]As this Court observed: "To the contrary, we understand the instruction that the provisions are to 'take effect upon enactment' to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct." *Landgraf*, 511 U.S. at 280.

set of circumstances or to a case pending in the federal courts and what is the "relevant retroactivity event" for determining whether the new law applies. The Court should grant review because of the importance of the issue and because of the need to provide additional guidance to courts of appeal as to when the default rule in *Landgraf* does **not** apply. Petitioners urge the Court to rule that under *Altmann* the "default rule" in *Landgraf* does not apply to defenses of sovereign immunity, whether asserted by foreign governments under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 *et seq.* ("FSIA"), or by the United States. The "relevant retroactivity event" was the assertion of the sovereign immunity defense to the payment of pre-November 21, 1991, prejudgment interest after the entry of final judgment which occurred two years after the effective date of Section 114(2). Since the application of Section 114(2) to this case is not "retroactive," the district court had the discretion under Section 114(2) to award pre-November 21, 1991 prejudgment interest for delay in payment of backpay and attorney's fees.

The Court should grant the Petition to consider whether the *Altmann* rule of decision applies to this case and to further the public policy goals of the Equal Employment Opportunity Act of 1972, "to eradicate 'entrenched discrimination in the Federal service.'" *Chandler v. Roudebush*, 425 U.S. 840, 841 (1976) (citations omitted). In the absence of an award of prejudgment interest, Petitioners will not be made whole and will receive only a partial remedy for the discrimination that suffered, a result that is contrary to the teachings of this Court. *E.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-419 (1975) ("the

compensation shall be equal to the injury") (citation omitted); *see also AT&T Corp. v. Hulteen*, 556 U.S. ___, 2009 WL 1361539 (May 18, 2009) ("societal attitudes about pregnancy and motherhood severely impeded women's employment opportunities") (citations omitted), (Ginsburg, J. dissenting); *Montana v. Kennedy*, 366 U.S. 308, 311 (1961) (*certiorari* was granted "in view of the apparent harshness of the result entailed").

II. APPLICATION OF *HENSLEY V. ECKERHART*

Initially, we note that Respondent confuses entitlement to an award of attorney's fees with the amount of attorney's fees that may be awarded. Respondent misconstrues Petitioners' claim, because Petitioners do not argue that the court "must" compensate attorneys for "time spent litigating unsuccessful 'issues' or contentions' or 'grounds.'" Opposition at 13. Nor do Petitioners claim that their "pursuit of all forms of relief related to a single cause of action would be compensable," *id.*, no matter how unrelated. Petitioners do not dispute that *Hensley v. Eckerhart*, 461 U.S. 424 (1983) ("*Hensley*") mandates that fee awards be related to the success obtained. *See* Opposition at 14.

"Once civil rights litigation materially alters the legal relationship between the parties, 'the degree of the plaintiff's overall success goes to the reasonableness' of the fee award under *Hensley v. Eckerhart.*" *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (citation omitted). "[T]he **degree** of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a

reasonable fee, not to eligibility for a fee award at all." *Tex. State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 790-93 (1989) (emphasis in original).

A.

The Court should grant *Certiorari* because the decision below is contrary to the decisions from eleven other courts of appeal. If the D.C. Circuit had followed the analysis of the other circuits, it would have recognized that interest could not be a separate "claim" from the backpay on which the interest was based. Prejudgment interest is an integral part of the relief used to make a winning plaintiff whole. *Kansas v. Colorado*, 533 U.S. 1, 10-11 (2001) (citations omitted). Thus, the claim for interest can not be *"distinct in all respects* from [the plaintiff's] successful claims," *Hensley*, at 440 (emphasis added), no matter what the standard of review.[2] No cause of action for interest

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[2]Respondent also argues that were this Court to accept the Petition, it might have to decide what it characterizes as a "threshold issue" of "the applicable standard of appellate review" prior to "reaching the merits." Opposition at 16-17. Review of whether plaintiffs continue to be "prevailing parties" entitled to apply for costs and attorney's fees is *de novo*. *Jenkins v. State of Missouri*, 127 F.3d 709, 713 (8th Cir. 1997) (citations omitted); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").

Under the circumstances present here, where the court of appeals ruled that Petitioners were no longer "prevailing parties" on the ground that interest is separate and "distinct in all respects" from back pay, "an error of law is always tantamount to an abuse of discretion." *See De Jesus Nazario v. Rodriguez*, 554 F.3d 196,

could be raised in a separate lawsuit because interest is never separate and "distinct in all respects" from the claim seeking backpay. Without an award of backpay, there is nothing on which to base an award of prejudgment interest.

The Court should grant the Petition for *Certiorari* because the D.C. Circuit's failure to follow *Hensley*'s distinction between claims and issues creates a split in the circuits that this Court should resolve. The effect of the lower court's ruling was to require the plaintiff class to demonstrate a second time that the plaintiff class was a "prevailing party," this time on the narrow issue of pre-1991 interest, in order to again cross the "prevailing party" threshold to be entitled to request reasonable attorney's fees for legal services performed on this issue. Thus, the ruling is contrary to *Commissioner, INS v. Jean*, 496 U.S. 154, 160 (1990). Since Petitioners retained their status as "prevailing parties," they were entitled under *Hensley* and its progeny to be considered for reasonable attorney's fees and costs for post-remand services.

B.

The district court has the power to award attorney's fees and costs to prevailing parties for services reasonably rendered after entry of the Consent Decree, even if Petitioners do not prevail on their principal argument that they are entitled to pre-November 21, 1991 prejudgment interest under

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199 (1st Cir. 2009) (citations omitted). Thus, the D.C. Circuit's decision not to decide the standard of review should not affect the Court's decision on whether to grant review.

Altmann. *E.g.*, *Jenkins v. State of Missouri*, 127 F.3d at 714.

Once plaintiff class members become "prevailing parties" by securing underlying court-ordered relief, their success or failure in post-judgment enforcement actions or motions is only one factor to consider in determining whether plaintiffs are entitled to attorney's fees for these services. *Cody v. Hillard*, 304 F.3d 767, 773-775 (8th Cir. 2002). Thus, the lower courts here should have considered the success of the plaintiff class as a whole in determining whether an award of attorney's fees for post-Judgment services was appropriate. Because Petitioners achieved the maximum success possible when the 1993 Consent Decree awarded Petitioners every dollar in backpay recommended in the report by their expert witness, the district court may exercise its discretion to make an award of attorney's fees for litigation on issues that arose after entry of judgment, regardless of the outcome of a particular motion.

Respondent fails to address decisions by other courts of appeal awarding "prevailing" class action plaintiffs reasonable attorney's fees for litigation on issues that arose after entry of decrees, even when the civil rights plaintiffs lost on those particular issues. *E.g.*, *Plyler v. Evatt*, 902 F.2d 273, 280-281 (4th Cir.1990); *Johnson v. City of Tulsa, Oklahoma*, 489 F.3d 1089, 1111 (10th Cir. 2007); *see* Petition at 34-35. Under these decisions, Petitioners would have an opportunity to apply for an award of attorney's fees from a district court that recognizes its power to exercise its discretion to consider Petitioners' success in the litigation as a whole in deciding whether to award attorney's fees and costs.

The Court should grant *Certiorari* to bring the D.C. Circuit into compliance with *Jean* and to resolve a split in the circuits created by the lower court, whose ruling differs from the approaches taken by other circuits as to the standards for compensating class counsel for services following entry of a consent decree.

C.

Respondent's Opposition to granting the Petition is based on several errors. *See* Opposition at 11. As noted above, the decisions below are contrary to *Hensley* and the decisions of eleven other courts of appeal. Under the correct view of *Hensley*, the interest issue can not be a separate and "distinct in all respects" claim from the backpay claim on which Petitioners prevailed. The lower courts misread *Hensley*.

Petitioners' argument is directed to the failure of the district court to recognize it had the discretion to consider their motion for the award of attorney's fees. Petitioners argue they were entitled to apply to the district court for attorney's fees, which should have considered their application in light of their overall success on the merits, instead of proceeding under the erroneous legal view that the court lacked all authority to award any attorney's fees for work during the interest phase of the litigation, or that it was required to disregard Petitioners' overall success on the merits in addressing the fees issue.

Petitioners submit the district court should have considered their claim for attorney's fees based on their overall level of success, not just the outcome of a particular post-decree motion. The district court could not fulfill its duty to determine what fee is "reasonable" under *Hensley*, because the district judge did not

recognize he had the authority to award any fee because he erroneously concluded Petitioners lost their status as "prevailing parties." *See* App at 28a.

Contrary to Respondent's contention, Petitioners do not assert that all of their work "must be compensated if a plaintiff wins any relief in connection with that cause of action." *See* Opposition at 14-15 (footnote omitted). Rather, Petitioners seek to have the district court exercise its discretion under *Hensley* to consider its application for fees under correct legal standards.

D.

Respondent opposes granting review of the second question because this issue arises in "an unusual context...." Opposition at 11. Later, Respondent asserts: "Even if this issue were otherwise worthy of this Court's attention, this case would be an undesirable vehicle for addressing the question petitioners present." Opposition at 16. These statements are incorrect and reflect the Respondent's erroneous view of the issues presented.

Petitioners ask this Court to decide whether they remain "prevailing parties" under *Hensley* and its progeny. Resolution of this issue turns on the correct interpretation of *Hensley*, not on the type of relief sought by the plaintiff class. The fact that Petitioners sought additional relief in the form of pre-November, 1991 prejudgment interest under the Civil Rights Act of 1991 is irrelevant to the *Hensley* issue, which should be treated like any post-Judgment motion.

Respondent also states "disputes about the attendant attorney's fee award [are] rarer still." Opposition at 16. To the contrary, the issue of

awarding attorney's fees for post-judgment services frequently arises in class action litigation, in the cases cited above, as well as in cases cited by the United States and by Petitioners in the court of appeals. *See also, e.g., Gautreaux v. Chicago Housing Authority*, 491 F.3d 649 (7th Cir. 2007); *Alliance to End Repression v. City of Chicago*, 356 F.3d 767 (7th Cir. 2004). This Petition raises an issue relating to the standards for post-Judgment award of attorney's fees and costs that extends far beyond specific facts presented here. Granting review would provide guidance to lower courts on the correct interpretation of *Hensley* and the proper standard for awarding post-judgment attorney's fees in class actions for post-Judgment services and correct an egregious error by the lower court. *See Ash v. Tyson Food, Inc.*, 546 U.S. 454, 456-458 (2006) (granting *certiorari*, vacating, and remanding where the error in the lower court's opinion is obvious).

Allowing the court of appeals' decision to stand runs the risk of discouraging counsel from providing diligent post-judgment representation to prevailing parties in class actions and thus defeating the public policy of allowing statutory fees to prevailing parties in civil rights cases. *Jaffe v. Redmond*, 142 F.3d 409, 414, 416-418 (7th Cir. 1998); *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516, 526 (7th Cir. 1995).

CONCLUSION

The Petition for a Writ of Certiorari should be granted to resolve the important legal issue of how to identify the "relevant retroactivity event" which determines whether a statute waiving sovereign immunity is "prospective."

Review of the second question should be granted to resolve the conflict between the court of appeals below and the other eleven circuits on whether under *Hensley* interest can be separate and "distinct in all respects" from a Title VII backpay award when determining eligibility to apply for attorney's fees.

Respectfully submitted,

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